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JAMES D. MAHER,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1920

CARLISLE PACKING COMPANY,
a corporation,
Petitioner,

—vs—

OLE SANDANGER,
Respondent.

No. [redacted]

PETITION FOR WRIT OF CERTIORARI

JAMES A. KERR,
EVAN S. MCCORD,
JOSEPH N. IVEY,
Attorneys for Petitioner.

*Filed this*_____*day of November, 1920.*

JAMES D. MAHER, Clerk.

*By*_____*Deputy Clerk.*

LAW BRIEF PRINT SHOP—SEATTLE

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Carlisle Packing Company, respectfully represents:

1. The respondent instituted this action to recover damages for personal injuries alleged to have been sustained on the 8th of February, 1917, through

the negligence of the petitioner, while employed as a seaman on one of the motor boats of the petitioner near Cordova, Alaska. The amount sued for was $10,475.00.

2. The grounds of negligence as stated in the complaint were as follows:

"That on March 7, 1917, plaintiff was sent aboard a certain motor boat operated by defendant under the command of one Iver Stensland, which boat was engaged in procuring a load of sand to be used for construction work at the cannery; that sometime after dinner on said day it became the duty of plaintiff to start a fire in the sheet iron stove in the galley of said boat to heat dish water; that the wood provided was green, and that according to the general custom plaintiff poured kerosene thereon and lighted a match to start the fire.

"That by reason of gross carelessness and negligence of the defendant in keeping side by side in its oil house drums of gasoline and kerosene with no distinguishing marks, and by reason of the carelessness of the defendant's employees, including the captain in charge of the boat, the kerosene can used by plaintiff had been filled with gasoline instead.

"That by reason of such careless and negligent substitution of gasoline for kerosene, the plaintiff, having saturated the wood in the stove with what he believed to be kerosene, was about to light said fire with a match when a violent explosion took place and plaintiff was severely burned.

"That the defendant very negligently and contrary to the laws of Congress failed to provide any life preservers upon the boat; and by reason of such failure, plaintiff's burns were aggravated while vainly looking for such life preservers before jumping into the sea to extinguish the flames in his burning clothing." (Record, page —.)

The answer contained a general denial, together with the defenses of assumption of risk and contributory negligence.

3. The case was tried to a jury and a verdict rendered for $7,175.00. This sum was reduced by the lower court to $4,175.00. Upon the pleadings and bill of exceptions duly settled, and the record, the case was appealed to the Supreme Court of the State of Washington. On the 14th of September, 1920, the Supreme Court of the State of Washington filed an opinion in the case affirming the judgment of the Superior Court of the State of Washington for King County, in which court the action was instituted.

4. A petition for rehearing was filed by the petitioner and was denied by the Supreme Court of Washington on the 17th day of November, 1920. Judgment therefore, was not affirmed formally by the Supreme Court of Washington until the date of the denial of the petition for a rehearing. The opinion of the court is reported in ———— Pacific, page —.

5. The respondent, Sandanger, is a resident of the State of Washington. The petitioner is a corporation organized and existing under the laws of the State of Washington. It owns and operates a

salmon cannery near Cordova, Alaska, and conducts a fishing business, in connection with which it operates several motor boats. On and prior to March 7, 1917, the respondent was employed by petitioner in and about its cannery and also upon its motor boats as he might be directed. On that day he was assigned to duty upon one of petitioner's motor boats as one of the crew consisting of himself and three others, one Stensland being in command. The boat was 28 feet long with an enclosed cabin forward, in which there was a motor near the middle, and a bunk and bench along one side, and a bench along the other side on which sat a small sheet iron stove used for cooking meals for the crew. Under the bench on which the stove sat, but further forward, there was a one-gallon kerosene oil can. This can with kerosene in it had been furnished for the purpose of filling the lamps of the boat.

According to custom, kerosene was taken from the can and used to light fires in the small stove, that is, by first pouring a small quantity of the kerosene on some wood and then applying a lighted match to the wood. Respondent had worked upon this boat as a member of its crew on several former occasions and was well acquainted with its arrangement and equipment, including the kerosene oil can;

and also the custom of using kerosene from the can to start fires in the stove.

About seven o'clock in the morning of February 8, 1917, the boat left the cannery to go some twenty miles southwesterly for a load of sand. The boat arrived at its destination about noon. The boat was provisioned for the noon meal of the crew in view of the fact that the trip would take all day. One of the crew started a fire in the cook stove for the purpose of preparing the noon meal. The meal was prepared and served. By this time the boat had started on its homeward voyage. About an hour after the serving of the meal, respondent was directed by Stensland to start a fire in the stove to heat water to wash the dishes. He went into the cabin and placed some wood in the stove, took the kerosene oil can from its accustomed place and poured a small quantity of whatever was in the can on the wood and lighted a match and dropped it upon the wood in the stove. There was a flare-up, and as a result thereof the respondent was burned. For the injuries thus sustained he seeks to recover in this action.

The testimony is in conflict as to the time the kerosene was poured upon the wood. The witnesses for the petitioner testified that the fire used in cook-

ing the meal had not gone out but that hot coals were contained in the stove covered by ashes and that the pouring of the kerosene on the hot embers in the stove, the existence of which the respondent had knowledge, caused the flare-up and the resulting injury. This was denied by some of the witnesses for the respondent. There was no evidence as to whether the kerosene can contained kerosene or gasoline, but it is a conceded fact that the pouring of kerosene on heated embers would have produced the same result that would be produced from the similar use of gasoline.

It was also contended that the kerosene can was filled from time to time as it became empty, by Stensland, the master of the vessel; that he procured the kerosene from a 50-gallon drum kept in the warehouse of the petitioner on shore. There is a conflict in the testimony as to whether or not the kerosene drum in the warehouse was marked or identified so as to distinguish it from a similar drum containing gasoline kept in the same warehouse. The evidence was uncontradicted, however, that kerosene drums have the ends painted white and gasoline drums have their ends painted red. Respondent sought to establish that the contents of

the kerosene can was gasoline from the fact that the contents of the can were taken from one or the other of the drums in the warehouse.

6. The complaint alleged and the testimony without contradiction established that the plaintiff was a seaman at the time of his injury and the Supreme Court of Washington in its opinion so found.

The respondent, at the time of the injury was therefore engaged in the performance of a maritime service upon the motor boat of the petitioner. It was established by the evidence without contradiction that the respondent had been paid in full for his services under his maritime contract for the fishing season covering a period of several months; that his doctor's bills, hospital charges and medical attendance had likewise been paid by the petitioner from the time of his injury until his return to Seattle and that the total amount of his additional claims for medical attendance and drugs subsequent to his return to Seattle from Cordova amounted to the sum of $175.00.

7. At the conclusion of the testimony the petitioner moved the court for a directed verdict in favor of the plaintiff and against the defendant for the sum of $175.00 and no more, upon the grounds

and for the reason that the measure of damages was to be determined according to the maritime law and not according to the rules of the common law. The petitioner at the same time claimed immunity from liability for any elements of damages other than those elements of damages allowed under the maritime law in an action of this character. The petitioner contended that the respondent was not entitled in any event to recover for any elements of damage other than his wages for the season, his doctor's bills, hospital charges, medical attendance and the cost of his cure. All of these claims had been satisfied and paid by the petitioner except the sum of $175.00.

The petitioner claimed immunity under an authority exercised under the laws of the United States. A federal question was therefore necessarily involved. Petitioner claimed that such question should be determined in accordance with the law as expounded by the admiralty courts of the United States acting under an authority of the laws of the United States fixing the measure of damages on the part of a claimant injured in the performance of his duties under a maritime service.

The petitioner further claimed immunity under section 2, Article III of the Constitution of the

United States extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction; and under section 8 of Article I of the Constitution of the United States, which gives Congress power to make all laws necessary and proper to carry into execution the powers vested in the government, or in any department or officer thereof; and under section 24 of the Judicial Code, which reads as follows:

"Sec. 24. The district courts shall have original jurisdiction as follows: * * *

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; * * * "

36 U. S. Statutes at Large, 1091.

The petitioner further claimed immunity from liability for any damages in excess of those damages allowed under maritime law as expounded by the admiralty courts in pursuance of the Constitutional and Congressional authority above mentioned.

It was further urged that the respondent had an election of remedies only. He could go into the common law courts or into the admiralty courts for the redress of his wrongs but that the amount of his recovery must be limited by the maritime law regardless of the forum selected by him; that if the respondent had brought his action in the admiralty

courts, he would have been limited in his recovery to the wages of the voyage, his medical and hospital attendance and the cost of his cure, which the evidence established at a sum not in excess of $175.00, and that when the respondent selected the common law forum, he could recover no greater amount of damages than that fixed by the settled law of the admiralty courts.

8. The court denied the motion of the petitioner, allowing the petitioner an exception. (Bill of Exceptions, page 333.) The petitioner, after the denial of its motion for an instructed verdict, requested the court to instruct the jury that the measure of respondent's damages should be limited to the amount of his wages for the period of his employment, his hospital and doctor's bills and expenses of his cure. (Instruction, page 24; Bill of Exceptions, page 31.) The court refused such requested instruction and allowed an exception to the petitioner. After the rendition of the verdict, petitioner moved the court for judgment *non obstante*, raising the same grounds, which was likewise denied and an exception allowed. (Record, page —.)

9. In the Supreme Court of the State of Washington, orally and in its briefs, the petitioner again urged the same grounds. The Supreme Court of Washington, in its opinion, says:

"It does seem that respondent's employment and service on the day in question was maritime in its nature. We shall so assume in our disposition of the case, without further discussion of that question."

The court in its opinion, further says:

"Counsel for appellant invoke the federal statute defining the admiralty jurisdiction of the federal district courts * * * "

And quoted section 24 of the Judicial Code, and further says:

"Proceeding upon the theory that this statute saves to suitors merely the right to sue in the common law courts and avail themselves of the procedure of those courts, and does not enable such suitors to avail themselves in those courts, any more than in the federal admiralty courts, of the rules of substantive common law as controlling of their rights; counsel for appellant invoke the principles of maritime law as announced by Mr. Justice Brown, speaking for the Supreme Court of the United States in The Osceola, 189 U. S. 158."

The immunity under the maritime law claimed by the petitioner was fully considered by the Superior Court of King County, Washington, as well as by the Supreme Court of the State of Washington, as shown by its opinion, and such immunity was denied by the Supreme Court of Washington. The construction of the maritime law as announced by the Supreme Court of Washington was a construction different from the maritime law as expounded by the admiralty courts and the contention of the

petitioner was defeated by the construction of such maritime law by the Supreme Court of Washington.

The Supreme Court in its opinion, declined to restrict the amount of respondent's recovery to those elements for which recovery could be had under the measure of damages established by the admiralty courts. The respondent was permitted to recover, not according to the rules of maritime law, but according to the rules of the common law.

10. The Supreme Court of Washington, in its opinion said:

"We conclude that respondent's recovery in this case may be sustained upon the theory that his injuries were received in consequence of the 'unseaworthiness' of the boat upon which he was working."

But there was no evidence in the record tending to show any unseaworthiness. Interpreting the evidence in the most favorable light for the respondent, the injury could only have resulted from the improper and negligent instruction of Stensland to use kerosene in lighting the fire, or from the alleged negligence of Stensland in mistakenly putting into the kerosene can, gasoline instead of kerosene. In other words, there is no possible ground for the claim of unseaworthiness. If the injury resulted from the negligence of anyone, it was the negligence

of the master of the vessel. The question before the Supreme Court of Washington was identical with the question involved in the case of *Chelentis vs. Luckenbach*, 247 U. S. 372. In that case a seaman was washed overboard and his leg broken, as it was claimed, as a result of a negligent and improvident order given by a superior officer. The injury to respondent in this case could only have resulted from the negligent or improvident order of Stensland, his superior officer in directing him to use the kerosene in lighting the fire, or from the negligence of Stensland in permitting the kerosene can to contain gasoline instead of kerosene.

Yet, under the guise of alleged unseaworthiness the court in its opinion disregards the holding of this court in the *Chelentis* case and the uniform holdings of the admiralty courts and refused to apply the rules of the maritime law as expounded by such courts and applied the rules of the common law instead of the rules of the maritime law as to the measure of respondent's damages.

11. The record from the Supreme Court of Washington in this case has been ordered by the petitioner and is now in the course of preparation and will be forwarded to this court as speedily as possible. The remittitur from the Supreme Court of Washington will be sent to the lower court and

execution will issue thereon unless such judgment of the Supreme Court of Washington be superseded; that the respondent, Ole Sandanger, is insolvent and if the judgment in his favor be paid, the petitioner will be without remedy and will be denied the right to have determined by this court the immunity claimed by it as hereinbefore stated.

12. Your petitioner respectfully further represents that the questions embraced within the scope of this application are of great importance to those engaged in shipping and maritime endeavors; such questions involve matters of great importance to the public generally; they involve the rights of litigants generally. It is necessary to have them properly determined in order that there may be uniformity in the decisions of the state courts in the interpretation of the maritime law. Unless such questions be finally decided by this court, litigants can be deprived of their rights under the maritime law by applying the rules of the common law under the guise of unseaworthiness where none exists.

Wherefore, your petitioner respectfully prays and petitions:

(1) For an order of supersedeas staying execution of the judgment rendered in this cause, upon the execution by petitioner to the respondent of a bond in such amount and upon such conditions as may be fixed by this court, which bond the peti-

tioner is able and willing to furnish in such amount and conditioned as may be prescribed by this court.

(2) That a writ of certiorari may be issued out of and under the seal of this court directed to the Supreme Court of the State of Washington, commanding said court to certify and send to this court upon a certain day to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of Washington in the case therein entitled: "Ole Sandanger, Respondent vs. Carlisle Packing Company, Appellant, No. 15407," and to withhold any further action or order in said cause until the further order of this court to the end that the case made be reviewed and determined by this court; and that your petitioner may have such other and further relief and remedy in the premises as to this court may seem appropriate; and that the judgment of said Supreme Court of Washington in this case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

CARLISLE PACKING COMPANY.
By EVAN S. McCORD,
Attorney for Petitioner.

JAMES A. KERR,
EVAN S. McCORD,
J. N. IVEY,
Attorneys for Petitioner.

STATE OF WASHINGTON,
COUNTY OF KING. } ss.

E. S. McCORD, being first duly sworn, deposes and says:

That he is one of the attorneys for the Carlisle Packing Company, the petitioner above-named, and as such, has had personal charge of the case in the foregoing petition mentioned in the Superior Court of the State of Washington for King County, and also in the Supreme Court of the State of Washington; that he has read the foregoing petition by him subscribed and that the facts therein contained are true to the best of his information and belief.

E. S. McCORD.

Subscribed and sworn to before me this ——— day of November, 1920.

J. N. IVEY,
Notary Public in and for the State of Washington, residing at Seattle.